No. 92-1512

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MONROE AUTO EQUIPMENT COMPANY,
a Delaware Corporation,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOTIVE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), MONROE AUTO EQUIPMENT COMPANY UNIT OF LOCAL 878,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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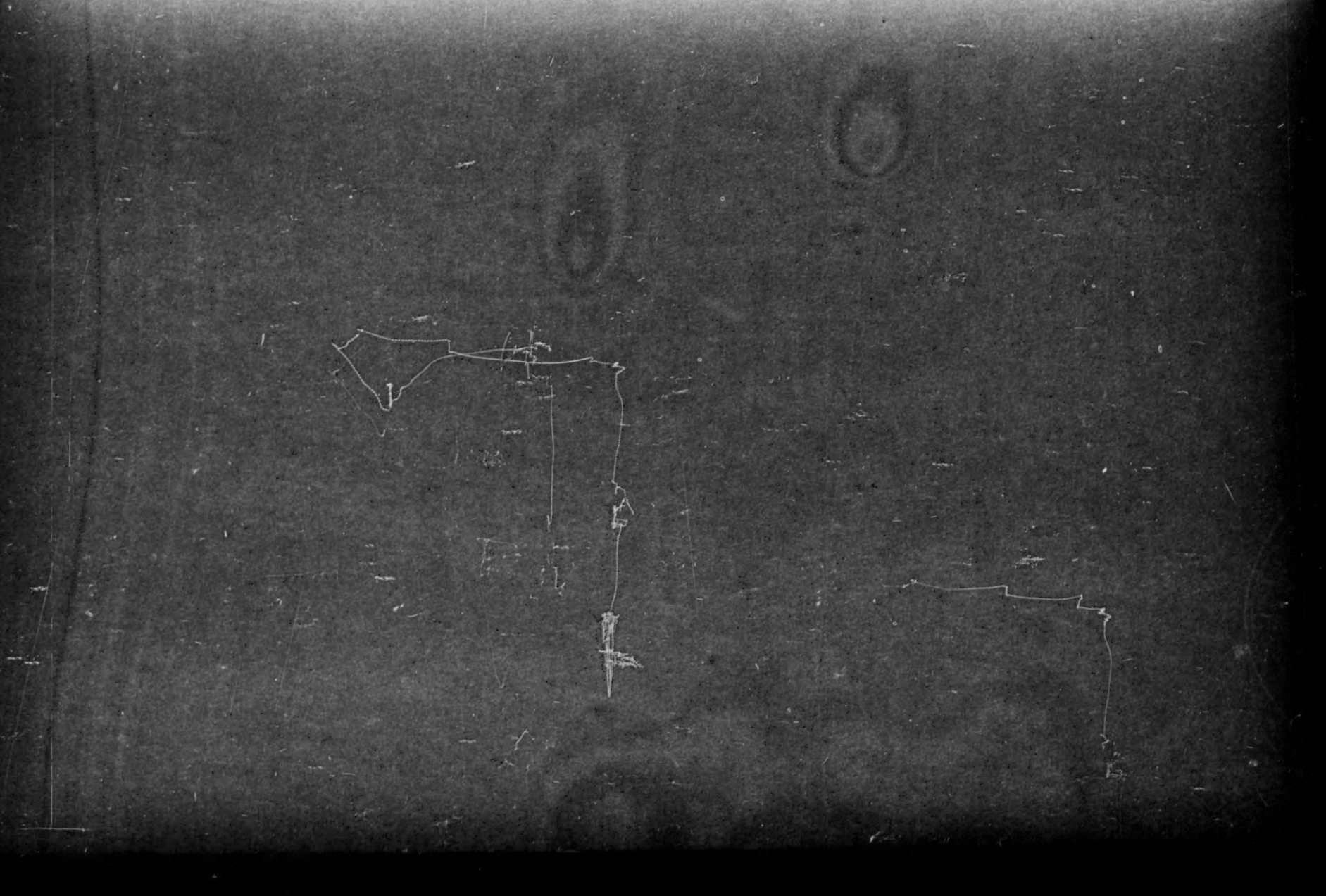

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RESPONDENT'S BRIEF IN OPPOSITION

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Monroe Auto Equipment Company, Unit of Local 878 (hereafter "UAW" or "Union") by counsel, respectfully prays that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit for review of the judgment in *Monroe Auto Equipment Company v. International Union, United Automobile, Aerospace and Agricultural Imple-*

ment Workers of America (UAW), Monroe Auto Equipment Company Unit of Local 878, 981 F.2d 261 (6th Cir. 1992).

COUNTER-STATEMENT OF THE CASE

This case involves the arbitration of a garden variety labor-management grievance dispute between Monroe Auto Equipment Company (hereafter "Monroe" or "Petitioner") and the UAW over whether an employee was discharged for just cause under the terms of a collective bargaining agreement. The grievance arose after the Company, which failed and refused to negotiate a drug testing policy with the Union, nevertheless unilaterally imposed on bargaining unit employees a non-negotiated drug use and testing policy seeking to regulate, *inter alia*, the off-duty behavior of such employees. In the absence of specific contract language authorizing such testing, it implemented the policy allegedly, under its management right under the collective bargaining agreement to "make and enforce reasonable shop rules and regulations which do not conflict with the express terms of [the] agreement."

Enforcement of the resulting arbitration award by the District Court and the Sixth Circuit Court of Appeals below, demonstrates exactly how this Court's rules on judicial deference to arbitration awards, first set out in 1960 in *Steelworkers v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960), and recently restated and re-emphasized in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987) should be applied.

In 1989, David Rafko (Rafko) was a ten-year seniority employee who worked for Monroe under the terms of a collective bargaining agreement between Monroe and the UAW that was negotiated in 1988.

Rafko installed experimental shock absorbers and struts on cars and trucks which were then driven on public ways. Although there were a few occasions in which Rafko drove cars with test products installed, the bulk of

his time was spent underneath cars installing products, such as struts, that were not yet available on the market. (Pet. App. B-2)

The collective bargaining agreement contained no provisions specifically regulating employee use of drugs, whether such use was on-duty or off-duty. It did require that the employer demonstrate just cause for discharge, however. (Pet. App. C-14) As early as 1986, Monroe adopted a drug testing policy which applied only to non-UAW represented employees. During the negotiations for the 1988 agreement, Monroe proposed a drug testing program to the UAW but then withdrew it from the bargaining table. (Pet. App. C-17) Subsequently, in 1989, Monroe unilaterally implemented a drug testing policy for UAW bargaining unit employees. Such policy never became an explicit part of the agreement. (Pet. App. C-17) *Inter alia*, the policy contained a provision providing for the possibility of discharge for off-the-job illegal drug use that adversely affected an employee's job performance or jeopardized the safety of other employees, the public or company property. It also provided for the possibility of discharge if an employee was "under" the influence of drugs on company property.

In August of 1989, Monroe received an anonymous letter accusing Rafko of selling and usings drugs on the Company's premises. On October 5, 1989, David Rafko was questioned by an undercover investigator about his involvement in using drugs on the Company's premises. After being told by the Company that he would be terminated if he didn't sign a consent form for a drug test, he signed. (Pet. App. C-8) He was then subjected to a drug test and suspended pending receipt of results. On October 12, Rafko was terminated by the Company because he tested positive. (Pet. App. C-11)

The Union filed a grievance protesting Rafko's discharge as being without just cause.[1] The grievance was submitted to arbitration. The UAW and Monroe jointly

stipulated that one of the three issues to be submitted to the Arbitrator would be:

> Was David Rafko suspended with pay on October 5, 1989, and then discharged for "just cause" effective October 12, 1989? If the Company acted improperly as to the above, what shall the remedies be?

At the arbitration hearing, Monroe presented evidence that Rafko tested positive for marijuana use. It also presented testimony by a company-paid expert witness. The expert testified that there was no legal definition or standard for being under the influence of marijuana, as in the case of alcohol. He also testified there were no scientific studies that specifically linked degree of impairment with marijuana use. (Pet. App. C-10) He did, however, express his belief that Rafko was under the influence of marijuana.

The Arbitrator found no evidence of on-the-job drug use. As to Monroe's allegation of a violation of the off-the-job provisions of the policy, he considered the testimony of Monroe's management that they had never noted unsatisfactory performance or other behavior that indicated Rafko was under the influence of drugs. (Pet. App. C-7) Testimony also showed that Rafko was performing his job properly on the day he was sent to be tested for drugs and did not appear to be under the influence. The arbitrator found that Monroe had not proven that Rafko was impaired or under the influence of drugs. (Pet. App. A-2; C-22) He held that there was insufficient evidence to prove that there was just cause for Rafko's discharge and ordered him reinstated.

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[1] On October 26, 1989, the Union also filed charges with the National Labor Relations Board alleging that the Company violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act in unilaterally implementing the drug testing policy and mandating testing of bargaining unit employees without bargaining with the union. The NLRB case was deferred to arbitration. (Pet. App. C-3)

Monroe filed a complaint to vacate the arbitration Award and the UAW counter-claimed to enforce. Ruling on cross-motions for summary judgment, the District Court granted the UAW's motion and enforced the Award. The District Court, relying principally on *Misco*, concluded that the Arbitrator was authorized to interpret the agreement, including the meaning of the Company policy definition of "being under the influence" of drugs and held that the Award drew its essence from the agreement. The District Court further rejected Monroe's claim that the award should be overturned on public policy grounds.

On appeal, the Court of Appeals affirmed the District Court. It considered the laws and regulations proposed by Monroe and held that Monroe did not identify law or legal precedents which indicate that the Award reinstating Rafko violated a well-defined and dominant public policy. (Pet. App. A-15)

REASONS FOR DENYING THE WRIT

Monroe maintains that the "question presented,"—whether the Sixth Circuit misconstrued *Misco* when it held that public policy permits an employee discharged for working under the influence of illegal drugs to be reinstated to a safety-sensitive position—merits plenary consideration by this Court.

The Sixth Circuit decision upheld an arbitrator's award reinstating an employee who was accused by Monroe of being under the influence of marijuana to a job that Monroe considered to be safety-sensitive. Monroe, in essence, asks whether there is a public policy that permits that result. The answer is clearly yes. The federal policy of settling labor disputes by arbitration without the intervention of courts permits it. *Misco*, at 484 U.S. 36.

Monroe's arguments do not show that the Sixth Circuit misconstrued *Misco*. They demonstrate no direct conflict

between the decision below and other circuit courts. Nor do they show that the decision is in conflict with *Misco*. They do not advance any justification for this Court to exercise its discretion to review the decision below.

I. THERE IS NO CONFLICT BETWEEN CIRCUITS

Petitioner argues that lower courts have read *Misco* "so restrictively that the public policy exception [to enforcing arbitration awards] has been eviscerated." (Pet. 8) They suggest, as to public safety considerations of public policy, the issue left open in *Misco* "cries out for resolution." *Misco* left open the narrow question whether courts may "refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." 484 U.S. 45, n.12.

To support its claim, oddly, petitioner relies on two circuit court decisions [2] that apply the same public policy exception that it claims has been eviscerated to overturn awards. Monroe suggests that because those courts, *in dicta*, considered whether an award of reinstatement would have required unlawful conduct, or whether there was a specific legal prescription against reinstatement, those decisions justify revisiting the open issue left in *Misco*. That argument has little force.

What Monroe is suggesting is that when following the guidelines set forth in *Misco* to determine an explicit public policy that would be violated by reinstatement, a court commits error if it considers and discusses the most obvious or direct sources of a possible violation—a specific legal prohibition or compelled illegal conduct. *Misco* itself rejects such a suggestion and specifically indicates

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[2] *Delta Airlines v. Air Line Pilots Assn*, 861 F.2d 665 (11th Cir. 1988), cert. denied, 493 U.S. 871 (1989); *Iowa Electric Light and Power Co. v. Local Union 204 of International Brotherhood of Electrical Workers*, 834 F.2d 1424 (8th Cir. 1987).

that such considerations are consistent with its prescription for evaluating potential public policy and arbitration award conflicts.

Referring to its decision in *W.R. Grace*,[3] this Court said "our decision" in that case "turned on our examination of whether the award created any explicit conflict with other 'laws and legal precedents' . . ." *Misco* at 484 U.S. 43. In *W.R. Grace*, this Court found no explicit conflict between the award and the two public policies potentially jeopardized by the award and refused to overturn the arbitrator. In the cases cited by Monroe, those courts found explicit conflicts and overturned the awards. No inconsistency between *Misco* and the two cases cited by Monroe is shown.

Further, neither decision demonstrates a conflict with the Sixth Circuit decision presented here. Relying on *Misco*'s command that only public policies that explicitly conflict with arbitrator's awards justify overturning them, the Sixth Circuit held that Monroe did not identify law or legal precedents which indicate that the award violated a well defined and dominant public policy. It rejected Monroe's recitation of statutes and regulations after a review of them showed no explicit conflict with the award.[4]

The court further found that there was no arbitral finding that Rafko was impaired or intoxicated and distinguished the decisions cited here by Monroe on that ground. That distinction is sufficient to demonstrate that no inter-circuit conflict is created by the decision below.

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[3] *W.R. Grace Co. v. Rubber Workers*, 461 U.S. 757 (1983).

[4] None of the laws or regulations cited by Monroe explicitly preclude reinstatement of employees who have smoked marijuana, whether or not they were under the influence of it. (Pet. 14) The Drug Free Work Place Act, 41 U.S.C. § 701(a)(1), and Michigan Law, MCLA § 333.6203 in fact encourage employers to rehabilitate drug-using employees.

Petitioner relies on *Georgia Power Co. v. International Brotherhood of Electrical Workers, Local 84*, 707 F.Supp. 531 (N.D. Ga. 1989), aff'd mem. 896 F.2d 507 (11th Cir. 1990) and other federal district court decisions to argue that there is a public policy prohibiting the employment of "drug-impaired individuals in safety-sensitive positions. (Pet. 11, 12) No inter-circuit conflict is created by decisions of the district courts. Moreover, the Sixth Circuit distinguished those cases on the same factual ground as it did in *Delta Airlines* and *Iowa Electric*, thus further eliminating any potential inter-circuit conflict.

Although the Sixth Circuit did not address the issue directly, that factual distinction serves to emphasize another crucially important aspect of the *Misco* decision—that an arbitral finding of a work rule violation is a necessary predicate to consideration of whether an award conflicts with some asserted public policy. Central to the Court's holding in *Misco* is its conclusion that "Even if the court of appeals' [formation] of public policy is to be accepted, no violation of that policy is clearly shown in this case." 484 U.S. 44. An assumed violation "provides an insufficient basis for holding that his reinstatement would actually violate the public policy identified. . ." *id.* This Court went on to chastise the Fifth Circuit for ignoring the arbitrators findings and substituting its own factfinding judgment so as to permit it to consider the public policy issue.

Even if the court below had found some applicable public policy, the absence of a factual finding by the arbitrator would have precluded it from overturning the award reinstating Rafko. Thus, no conflict would have resulted between circuits.

II. THE PETITION PRESENTS NO FEDERAL LAW QUESTION SUFFICIENTLY IMPORTANT TO JUSTIFY GRANTING A WRIT OF CERTIORARI

The decision below is scarcely of such national significance as petitioner maintains and presents no issue which this court should address. In light of the failure of Monroe to prove to the arbitrator below that Rafko had violated its work rule by being under the influence of marijuana, the question presented fails to present an issue that has not already been decided. Failure to prove that Rafko was under the influence of marijuana means that this case presents the same issue already decided in *Misco* —can an unproven allegation of illegal drug use be a sufficient ground to invoke public policy grounds for overturning an arbitrators award. *Misco* holds that it cannot.

Monroe attempts to show that Rafko's job of installing experimental struts and shock absorbers is a threat to public safety or is otherwise safety-sensitive. (Pet. 12, 13) Ignoring *Misco*'s instructions to rely on arbitral factfinding of safety hazards created by an employee, 484 U.S. 45 n.11, Monroe launches into speculative suggestions of potential harm to test drivers and the general public. They make no reference to any non-speculative safety-related fact found by the arbitrator that shows that *any* harm was caused by Rafko's performance of his job. *Misco* warns that a court cannot "upset [an] award because of its own view that public policy about plant safety was threatened." *Id.* at 45. Monroe's safety-sensitive argument fails. A refusal to enforce an award must rest on more than speculation or assumption. *Id.* at 44. Petitioner's solicitation that this court now take up the issue left open in *Misco*, notwithstanding, no issue sufficiently important to issue a Writ is presented by the decision below.

CONCLUSION

The centerpiece of *Misco* is this Court's emphasis on insisting that arbitrator findings be the necessary predicate for consideration by courts of public policy grounds if an arbitral award is to be overturned. The court below relied on arbitrator findings to conclude that the award should not be overturned. It is consistent with *Misco*.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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